SUPREME COURT, U. S.
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IN THE

Supreme Court of The United States

POP POPPENHEIMER, Individually,
and as the Legally Elected Representative
of Memphis and Shelby County Citizens,
Residents, and Taxpayers,
PLAINTIFFS-PETITIONERS

Vs.

THE STATE OF TENNESSEE, acting
through its agents and arms,
THE CITY OF MEMPHIS, TENNESSEE,
THE COUNTY OF SHELBY, TENNESSEE,
ET AL
DEFENDANTS-RESPONDENTS

RESPONDENT'S, COUNTY OF SHELBY, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

This brief is respectfully filed in behalf of the County of Shelby in opposition to the petition for writ of certiorari filed herein.

BASIC ISSUE

The basic issue presented by the Petition is whether the United States Court of Appeals for the Sixth Circuit was correct in affirming the ruling of the District Court in granting the County of Shelby's Motion to Dismiss for the reason that the question of reapportionment of the Quarterly Court of Shelby County is now res judicata by virtue of the decision in Hyden v. Baker, F. Supp. 475 (M. D. Tenn. 1968). (For convenience the parties will be referred to in accordance with their status in the trial court, that is Petitioners as "Plaintiffs" and Respondent County of Shelby as "Defendant").

II.

STATEMENT OF THE CASE

The defendant cannot accept the statement of facts of plaintiffs.

The plaintiffs in their original complaint stated that they were citizens, residents and taxpayers of the United States as well as citizens, residents and taxpayers of the County of Shelby and brought the action on behalf of themselves individually and on behalf of all other persons who are or who may become similarly situated in accordance with Rule 17 and Rule 23 (A) (3) respectively of the Federal Rules of Civil Procedure alleging that the Quarterly County Court of Shelby County was malapportioned.

The plaintiffs alleged that their constitutional rights were being violated and requested that the Quarterly County Court of Shelby County, Tennessee be reapportioned.

The defendant, County of Shelby, filed a Motion to Dismiss stating that the malapportionment of the Shelby County Quarterly Court had heretofore been adjudicated and the County of Shelby's Motion to Dismiss was sustained.

ARGUMENT

Did the District Court err in granting the County of Shelby's Motion to Dismiss for the reason that the question of reapportionment of the Quarterly Court of Shelby County is now res judicata by virtue of the decision in Hyden v. Baker 286 F. Supp. 475 (M. D. Tenn. 1968), which ruling was affirmed by the United States Court of Appeals for the Sixth Circuit? Appellee, County of Shelby, respectfully contends that both Courts were correct.

In the case of Hyden v. Baker 286 F. Supp. 475 (M. D. Tenn. 1968) (See footnote one at page 477), the Three-Judge Court was confronted with a complaint that was also brought by the respective plaintiffs in their own behalf and on behalf of all qualified voters in Shelby County and that Court made a determination that the respective plaintiffs may maintain under Rule 23 Federal Rules of Civil

Procedure the action as a class action on behalf of themselves and others similarly situated in their respective county.

The plaintiffs in Hayden v. Baker, supra, attacked the Shelby County Quarterly Court as then constituted and the Court held that the Shelby County Quarterly Court at that time was malapportioned and stated at page 485 as follows:

> "We hold, therefore, that the apportionment provisions of Article VI, Sec. 15, of the Constitution of Tennessee, T.C.A. Sec. 19-101, 19-102 and 19-103 and those portions of Chapter 421, Private Acts of 1919, and of Chapter 522, Private Acts of 1935, as amended by Chapter 166, Private Acts of 1939, relating thereto and consistent therewith, as applied to the apportionment of the Quarterly County Courts of Shelby and Washington Counties, are void as violative of rights secured by the Equal Protection Clause of the Fourteenth Amendment."

In order to correct the malapportionment as then existed the Three-Judge Court adopted the procedure stated as follows at page 485:

> "We are still of the belief that devising a constitutionally accepted method of apportioning representation on these local governmental units is more properly a legislative function than a judicial one. Accordingly, injunctive relief will not be or-

dered at this time. The General Assembly of Tennessee has just convened and it may well deal with this matter. Pending adjournment of the General Assembly jurisdiction will be retained, and, after such adjournment, the court will further consider the question of relief, if necessary."

The Shelby County Quarterly Court meeting in special session on August 7, 1968, pursuant to directions from the Three-Judge Court in Hyden v. Baker, supra, adopted a proposed plan for reapportioning the membership of the Shelby County Quarterly Court which was submitted for approval to the Three-Judge Court.

The Three-Judge Court by order dated September 3, 1968, (See Exhibit A) ordered as follows:

"A proposed plan was filed by the defendant August 14, 1968, and no objections have been filed On the contrary, plaintiffs have moved that the proposed plan be approved and that the court order an election to implement the plan.

"Upon consideration, the court is of the opinion that the proposed plan meets the requirements of the opinion heretofore rendered herein and it is, therefore, approved.

"To implement the plan, an election shall be held to fill the positions created thereby, such elec-

tion to be conducted November 5, 1968, in conjunction with the General Election of that date. Persons elected to the positions shall take office on January 1, 1969, and hold office until September 1, 1972, or until their successors are elected and qualified."

The Honorable District Court Judge was correct in granting the defendants' Motion to Dismiss and treating such motions as being in effect motions for summary judgment pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure in holding in his order as follows:

"With respect to the claim for reapportionment of the Shelby County Quarterly Court, we are of the opinion that such must be dismissed for the reason that this question is now res judicata by virtue of the decision in Hyden v. Baker, 286 F. Supp. 475 (M. D. Tenn. 1968). In that class action, the Court held that the Quarterly Court had been unconstitutionally apportioned and later approved the very plan of apportionment which is now in effect and which is being attacked by plaintiffs. Under the court order approved the apportionment, the members elected under such plan of apportionment are to hold office until September 1, 1972." (See Appendix No. II Plaintiff's brief page 39.

The General Assembly of the State of Tennessee

by Chapter 599 of the Public Acts of 1968 (Adj. S.), which is presently codified in the Tennessee Code Annotated at Section 5-111, has provided for the future apportionment and election of Justices of the Peace as follows:

"5-111. Apportionment and election of justices of the peace.—Prior to January 1, 1972, the county courts of the different counties shall meet and, a majority of the acting justices of the peace being present and concurring, shall change the boundaries of districts or redistrict a county entirely if necessary to apportion the justices of the peace among the districts substantially according to population, so as to provide for substantially the same number of persons per justice of the peace in each of the districts. At the August, 1972 election, justices of the peace shall be elected from the districts so provided.

"To determine the population within a district, United States census of population shall be used, but when United States census of population is not available the court may presume that the number of registered voters in a district is in direct proportion to the population within a district.

"Not later than each six (6) years following the first apportionment under the terms of this section, and each six (6) years thereafter the county courts, a majority of the acting justices of the peace being

present and concurring, shall apportion the justices of the peace among the districts substantially according to population.

"Upon application of any citizen of the county affected the chancery court of said county shall have original jurisdiction to review the county court's apportionment, and shall have jurisdiction to make such orders and decrees amending that apportionment to comply with this section, or if the county court fail to make apportionment, shall make a decree ordering an apportionment.

"The first and third paragraphs of this section shall not apply to any county which shall be districted and/or redistricted substantially according to population by private, special or local act by the eighty-fifth general assembly."

Defendant, County of Shelby, respectfully insists that the District Court and the United States Court of Appeals for the Sixth Circuit were correct.

CONCLUSION

For the reasons above stated, the defendant, County of Shelby, respectfully submits that the Petition for Certiorari fails to set forth any cause of action upon which relief could be granted and should be denied

and that the order of the Sixth Circuit Court of Appeals dismissing the Complaint should be appealed.

Respectfully submitted,

C. CLEVELAND DRENNON, JR.
County Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed two copies of the Brief to the Attorneys for all parties to the proceedings: namely: Mr. W. Slater Hollis, P. O. Box 80876, Memphis, Tennessee; Mr. James E. Swearengen, 2167 Chelsea Avenue, Memphis, Tennessee, Attorneys for Plaintiffs; Mr. James Manire, City Attorney, and Mr. Brady Bartusch, Assistant City Attorney, City Hall; Mr. Jack Petree, City Board of Education Attorney, and Ernest Kelly, Jr., Of Counsel, 900 Memphis Bank Building; Mr. Lee Winchester, Jr., Co. Bd. of Education Attorney, Suite 3200, 100 N. Main Building, all of Memphis, Tennessee, and Mr. David Pack, State Attorney General, Supreme Court Building, Nashville, Tennessee, this 30th day of July, 1971.

C. Cleveland Drennon Jr.

C. CLEVELAND DRENNON, JR.
County Attorney
Shelby County, Tennessee

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION.

LEE HYDEN, ET AL.
VS.
CHARLES W. BAKER, ET AL.

CIVIL NO. 4674

ORDER

By order entered July 1, 1968, this court directed defendant Quarterly County Court of Shelby County, Tennessee, to file with the court a proposed plan for reapportioning the membership of that body in compliance with the principles set forth in the opinion of the court in this action on February 13, 1968. It was directed that such proposed plan be filed on or before August 19, 1968, and it was further provided that, within ten (10) days after the filing of such plan, any party in this action would have the right to file objections thereto.

A proposed plan was filed by this defendant August 14, 1968, and no objections have been filed. On the contrary, plaintiffs have moved that the proposed plan be approved and that the court order an election to implement the plan.

Upon consideration, the court is of the opinion that

the proposed plan meets the requirements of the opinion heretofore rendered herein and it is, therefore, approved.

To implement the plan, an election shall be held to fill the positions created thereby, such election to be conducted November 5, 1968, in conjunction with the General Election of that date. Persons elected to the positions shall take office on January 1, 1969, and hold office until September 1, 1972, or until their successors are elected and qualified.

It is so ORDERED.

/s/ HARRY PHILLIPS
CIRCUIT JUDGE

/s/ WILLIAM E. MILLER
DISTRICT JUDGE

/c/ FRANK GRAY, JR.
DISTRICT JUDGE